87-981

No. [redacted]

Supreme Court, U.S.
FILED
JAN 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd.,

Petitioners,

v.

John C. RAINEY, Individually and as Personal Representative of the Estate of Barbara A. Rainey,

Respondent.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd.,

Petitioners,

v.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Dennis K. Larry
Donald H. Partington
Clark, Partington, Hart, Larry, Bond & Stackhouse
125 West Romana Street
Post Office Box 13010
Pensacola, FL 32591-3010
(904) 434-9200

Edward R. Curtis
McCune, Hiaasen, Crum, Ferris & Gardner
P.O. Box 14636
Fort Lauderdale, FL 33302
(305) 462-2000

Counsel for John L. Rainey and Rondi M. Knowlton, Respondents

January 15, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED FOR REVIEW

1. Whether This Court Should Grant Certiorari to Review the Eleventh Circuit's Ruling That Federal Rule of Evidence 803(8)(C) Does Not Permit The Admission, As "Factual Findings", of Opinions As To Ultimate Causation.

PARTIES TO PROCEEDING

1. John C. Rainey
2. Rondi M. Knowlton
3. Beech Aircraft Corporation
4. Beech Aerospace Services, Inc.
5. Pratt & Whitney Canada, Inc.
6. Raytheon Company is the parent corporation of Beech Aircraft Corporation and Beech Aircraft is the parent corporation of Beech Aerospace Services, Inc.
7. United Technologies Corporation is the parent corporation of Pratt & Whitney, Canada, Inc.
8. Underwriters at Lloyds of London and certain British companies; La Reunion Aeroienne; Aviation Office of America; and Skandia Insurance Company, Ltd., are the insurers of Beech Aircraft Corporation and Beech Aerospace Services, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
FEDERAL RULES OF EVIDENCE INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	4
I. This Court Should Deny the Petitions for Writ of Certiorari Because:	
A. Historically It Has Not Been the Role of the Supreme Court to Settle Differences Within the Circuits as to the Proper Interpretation of the Federal Rules of Evidence in Civil Cases.	4
B. The "Conflict" Concerning Rule 803(8)(C) is Not Sufficiently Direct to Justify The Court Taking Certiorari Jurisdiction.	7
C. The Eleventh Circuit's Narrow Construction of Rule 803(8)(C) is the Correct View. Accordingly The Supreme Court Should Not Grant Certiorari if the End Result is to Affirm the Eleventh Circuit.	12
D. Whether the Eleventh Circuit Correctly Applied Rules 106 and 801 is Not An Issue This Court Should Address, As No Conflict is Involved And the Application of these Rules to the Facts Was Unanimously Supported By The Eleventh Circuit Judges.	16
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES CITED:

Baker v. Elcona Homes Corp., 588 F.2d 551 (6th Cir. 1978) 10

Barefoot v. Estelle, 463 U.S. 880 (1983) 4

Baz v. Walters, 782 F.2d 701 (7th Cir. 1986) 10

Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) 13

Bourjaily v. United States, — U.S. —, 107 S. Ct. 2775 (1987) 4, 5

Chambers v. Mississippi, 410 U.S. 284 (1973) 4

Chandler v. Roudebush, 425 U.S. 840 (1976) 11, 12

Cohen v. General Motors, 534 F. Supp. 509 (W.D. Mo. 1982) 12

Diggs v. Lyons, 471 U.S. 1078 (1985) 5

Ellis v. International Playtex, Inc., 745 F.2d 292 (4th Cir. 1984) 10, 11

Garner v. United States, 439 U.S. 936 (1978) 5

In the Matter of the Complaint of Paducah Towing Company, Inc. v. United States, 692 F.2d 412 (6th Cir. 1982) 10

In Re Air Crash Disaster at Mannheim, Germany, 586 F. Supp. 711 (E.D. Penn. 1984), *Rev'd on other grounds*, 769 F.2d 115 (3d Cir. 1985), *cert. den.*, — U.S. —, 106 S. Ct. 851 (1986) 14

Kehm v. Proctor and Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983) 10

Luce v. United States, 469 U.S. 38 (1984) 4

McKethan v. United States, 439 U.S. 936 (1978) 5

TABLE OF AUTHORITIES—Continued

Page

McQuaig v. McCoy, 806 F.2d 1298 (5th Cir. 1987) 11

Means v. United States, 469 U.S. 1058 (1984) 5

Melville v. American Home Assurance Co., 584 F.2d 1306 (3d Cir. 1978) 10

Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986) 11

Plummer v. Western International Hotels Co., Inc., 656 F.2d 502 (9th Cir. 1981) 10

Rainey v. Beech Aircraft Corp., 784 F.2d 1523 (11th Cir. 1986) 2, 7, 16

Rainey v. Beech Aircraft Corp., 827 F.2d 1498 (11th Cir. 1987) (*en banc*) 1, 3, 8

Robbins v. Whelan, 653 F.2d 47 (1st Cir. 1981) 9

Smith v. Ithaca Corp., 612 F.2d 215 (5th Cir. 1980) 13

Stissi v. Interstate and Ocean Transport Co., 765 F.2d 370 (2d Cir. 1985) 11

Tanner v. United States, — U.S. —, 107 S. Ct. 2739 (1987) 4

United States v. Abel, 469 U.S. 45 (1984) 4

United States v. Inadi, — U.S. —, 106 S. Ct. 1121 (1986) 4

United States v. Nobles, 422 U.S. 225 (1975) 4

United States v. Smith, 521 F.2d 957 (D.C. Cir. 1975) 9

Upjohn Company v. United States, 449 U.S. 383 (1981) 4

Wilson v. Beebe, 743 F.2d 342 (6th Cir. 1984) 10

Zenith Radio Corporation v. Matsushita Electric Industries Co., 505 F. Supp. 1125 (E.D. Pa. 1980) 14

TABLE OF AUTHORITIES—Continued

	Page
RULES AND STATUTES	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1732(a)	9
Federal Rule of Evidence 102	15
Federal Rule of Evidence 106	3, 16
Federal Rule of Evidence 609(a)	5
Federal Rule of Evidence 801	3, 5, 16
Federal Rule of Evidence 803(6)	13
Federal Rule of Evidence 803(8)(C)	*passim*
Federal Rule of Evidence 804(b)(5)	5
OTHER AUTHORITY	
4 Weinstein, *Evidence* 803(8)[03] at 803-251	14
Feeney, *Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court*, 67 F.R.D. at 195, 305	7

No. 87-259

In The

Supreme Court of the United States

October Term, 1987

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd.,

Petitioners,

v.

John C. RAINEY, Individually and as Personal Representative of the Estate of Barbara A. Rainey,

Respondent.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd.,

Petitioners,

v.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 827 F.2d 1498 (11th Cir. 1987).

The order granting the rehearing *en banc* is reported at 791 F.2d 833 (11th Cir. 1986).

The original opinion of the Court of Appeals is reported at 784 F.2d 1523 (11th Cir. 1986).

The final judgments for defendants on jury verdicts in the United States District Court for the Northern District of Florida (Pensacola Div.) were not reported.

—o—

JURISDICTION

The *en banc* judgment of the Eleventh Circuit Court of Appeals was entered on September 22, 1987 and reinstated the panel opinion entered on March 25, 1986. Petitioners seek to invoke jurisdiction of this Court pursuant to 28 U.S.C. 1254(1).

—o—

FEDERAL RULES OF EVIDENCE INVOLVED

1. Federal Rule of Evidence 803(8)(C). *Hearsay Exceptions; Availability of Declarant Immaterial,* provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (8) *Public records and reports.* Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . .
>
> (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

2. Federal Evidence Rule 106. *Remainder of or Related Writings or Recorded Statements,* provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

3. Federal Rule of Evidence Rule 801. *Definitions,* provides as follows:

> The following definitions apply under this article:
>
> (d) *Statements which are not hearsay.* A statement is not hearsay if—
>
> (1) *Prior statement by witness.*—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is. . .
>
> (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . .

—o—

STATEMENT OF THE CASE

The factual and procedural background of this case is accurately and objectively outlined in the *en banc* opinion of the Eleventh Circuit Court of Appeals reported at 827 F.2d 1498 (11th Cir. 1987).

—o—

ARGUMENT

The petitioners have urged this Court to grant certiorari in three separately filed petitions. Since their arguments are essentially the same, respondents hereby offer their response to the petitions in this single brief.

I. This Court Should Deny the Petitions for Writ of Certiorari Because:

A. Historically It Has Not Been the Role of the Supreme Court to Settle Differences Within the Circuits as to the Proper Interpretation of the Federal Rules of Evidence in Civil Cases.

In the thirteen years since the Federal Rules of Evidence were adopted, this Court has generally refrained from taking certiorari to resolve evidentiary conflicts within the circuits. The only exceptions have been a few criminal cases, most of which involved issues pertaining to a criminal defendant's constitutional rights.[1] In fact, respondents have been unable to identify any civil case where the Court took certiorari jurisdiction to resolve a Federal Rule of Evidence conflict.

1. Respondents were able to identify nine criminal cases where the court considered issues pertaining to the Federal Rules of Evidence. *See Bourjaily v. United States*, — U.S. —, 107 S. Ct. 2775 (1987); *Tanner v. United States*, — U.S. —, 107 S. Ct. 2739 (1987); *United States v. Inadi*, — U.S. —, 106 S. Ct. 1121 (1986); *United States v. Abel*, 469 U.S. 45 (1984); *Luce v. United States*, 469 U.S. 38 (1984); *Barefoot v. Estelle*, 463 U.S. 880 (1983); *Upjohn Company v. United States*, 449 U.S. 383 (1981); *United States v. Nobles*, 422 U.S. 225 (1975); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

Only *Upjohn*, *Luce* and *Abel* did not expressly involve the interplay of the evidence rules and a defendant's constitutional rights. *Upjohn* and *Abel* actually only peripherally involved Rule 501 which provides that issues pertaining to the privilege of witnesses "shall be governed by the principles of the common law . . ."

This Court has, in several instances, even denied conflict certiorari in criminal cases where a clear, direct conflict existed within the circuits. In *Means v. United States*, 469 U.S. 1058 (1984), this Court denied a certiorari petition to consider Rule 801(d)(2)(E) (co-conspirators statement exception to the hearsay rule), even though the Sixth Circuit was "inconsistent with the stated position of every other Federal Court of Appeals." *Id.* (White J., dissenting).[2] In *Diggs v. Lyons*, 471 U.S. 1078 (1985), (White J., dissenting) the Court denied certiorari to resolve a conflict as to Rule 609(a) (admissibility of prior felony convictions), even though the Third Circuit's interpretation of Rule 609(a) directly conflicted with interpretation given the rule by the Eighth and Fifth Circuits. In *McKethan v. United States* and *Garner v. United States*, 439 U.S. 936 (1978) (consolidated), the Court denied certiorari to consider whether grand jury testimony was admissible under Rule 804(b)(5), the "catch-all" exception to the hearsay rule. Justice Stewart's dissent indicates that the Fourth Circuit advocated a broad view of that admissibility question, and the Fifth and Second Circuits supplied a much narrower view. *Id.* at 937. (Stewart, J., dissenting).

When this Court's Advisory Committee formulated Rule 803(8)(C) and sent it to Congress for consideration,

2. The Court eventually granted certiorari in another case concerning the same issue, *Bourjaily v. United States*, — U.S. —, 107 S. Ct. 2775 (1987).

it was aware that the federal district and circuit courts might interpret and apply the "factual findings" language of Rule 803(8)(C) in different ways. In the notes accompanying their draft of the Rules of Evidence, the Advisory Committee commented that the admissibility of evaluative reports was one of "[t]he more controversial area[s] of public records." Fed. R. Evid. 803 Advisory Committee note. The committee noted that there was diversity in the decisions pertaining to evaluative reports, due, in part, to the "variety of situations encountered, as well as to differences in principle." The Advisory Committee further noted that "[t]he formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility." *Id.*

The House and Senate Judiciary Committees disagreed, respectively, on whether "factual findings" should be narrowly construed to exclude opinions, or broadly construed to include them.[3] Nevertheless, that specific portion of the rule was adopted as proposed by the Supreme Court Advisory Committee, rather than specifically amending the language to make it clear that "factual findings" should be broadly defined to include "opinions".[4] Since that time, this Court and Congress have left interpretation of the rule to the district and circuit courts.

---

3. *See* H.R. No. 93-650 to accompany H.R. 5463, P.L. 93-595, p. 14 ("factual findings" to be strictly construed and evalutions and opinions shall not be admissible.) and S.R. No. 93-1227 to accompany H.R. 5463, P.L. 93-595, p. 18 (evalulative reports should be admissible unless trustworthiness is lacking.)

4. Congress made only minor changes to the Supreme Court's Rule 803(8)(C) by adding "and proceedings" after "in civil cases".

The Supreme Court should here continue that judicial restraint, recognizing that not every difference within the circuits as to the construction of the Rules of Evidence necessarily need be resolved by this Court.

B. The "Conflict" Concerning Rule 803(8)(C) is Not Sufficiently Direct to Justify the Court Taking Certiorari Jurisdiction.

In its petition, Beech Aircraft Corporation (hereinafter "Beech") argues the Court should take certiorari because "the Circuit Courts of this country are sharply divided on the issue of whether evaluative conclusions contained in trustworthy investigative reports are admissible pursuant to Rule 803(8)(C)." Beech Petition for Writ of Certiorari, p. 11. Respondents respectfully submit that this argument does not withstand scrutiny sufficient to justify the grant of certiorari which the petitioners seek.

While the Eleventh Circuit itself has recognized a "difference of opinion" within the circuits as to the meaning of the "factual findings" language of Rule 803(8)(C), *Rainey v. Beech Aircraft Corporation*, 784 F.2d 1523, 1527 (11th Cir. 1986), the difference of opinion does not rise to the level of a "direct conflict" sufficient to justify this Court's grant of certiorari.[5]

---

5. In a report entitled *Conflicts Involving Federal Law: A Review of Cases Presented to the Supreme Court,* which was contained with the report for proposed revisions of the appellate system prepared by the Commission on Revision of the Federal Court Appellate System published in 67 F.R.D. at 195, 305, the author, Professor Floyd Feeney, classified the inter-circuit conflicts presented to the Supreme Court as follows:

(Continued on following page)

The Eleventh Circuit below was called upon to decide whether Rule 803(8)(C) should have permitted the admission, as a "factual finding", of the written opinion of one investigator—an opinion which required the application of principles of aerodynamics, turbine engine design and operation, pneumatic fuel control function and design, variable pitch propeller operation, and sophisticated crash investigation skills. (It should be noted that none of the parties called an expert to testify who, by himself, possessed all of these required skills.) Moreover, it was a written opinion which was admitted enabling petitioners to avoid subjecting the author to cross-examination.

The Naval JAG investigator's clearly labeled "opinion" that pilot error was "[t]he most probable cause of the accident", *Rainey v. Beech Aircraft Corporation,* 827 F.2d 1498, 1505 (11th Cir. 1987) (*en banc*), was clearly

---

(Continued from previous page)

(1) Direct Conflict—A case in which the decision below deals with the same explicit point as some other case and reaches a contradictory result.

(2) Strong partial conflict—A case in which the decision below is in the same general area of the law as some other case and where the implications of the doctrine followed in one case would compel an opposite result in the other. These cases are not considered as conflicting directly because the points involved are not exactly the same.

(3) Weak partial conflict—A case in which there is some degree of legitimacy to the claim of conflict but where the conflict is more attenuated than in the strong partial category.

(4) No genuine conflict—A case in which a conflict is claimed but in which examination indicates no genuine inconsistency in outcome or doctrine.

not a "normative opinion" or "evaluative conclusion" such as those involved in many of the cases cited by petitioners. Rather, it was an opinion as to the principal, hotly contested liability issue as to which the parties' highly qualified experts differed. None of the circuit court cases cited by petitioners involved the admission of such an opinion as a "factual finding". The Eleventh Circuit's decision excluding the JAG investigator's opinion as to the cause of an accident is not in direct conflict with any circuit because no other circuit court has considered the admissibility of an opinion such as the one contained in the JAG report.

Those circuits which have admitted evaluations and opinions under the "factual findings" language of Rule 803(8)(C), have dealt with conclusions of quite a different character than the Naval JAG opinion of the instant case. In *United States v. Smith,* 521 F.2d 957 (D.C. Cir. 1975), the District of Columbia Circuit held that a police report containing "factual conclusions" was admissible under the Business Records Act, 28 U.S.C. § 1732(a), the predecessor of Rule 803(6). In dicta, the court expressed the opinion that the records would also be admissible under Rule 803(8)(C), 521 F.2d at 968, n.24. The factual conclusions included within the report appear to have been paraphrasals and descriptions gathered firsthand from witnesses and did not include any opinions as to ultimate guilt or liability. *Id.* at 960. The First Circuit, in *Robbins v. Whelan,* 653 F.2d 47 (1st Cir. 1981), *cert. denied,* 454 U.S. 1123 (1981), allowed the introduction of purely normative factual data compilations concerning automobile maximum stopping distances. *Whelan's* distinction from the case at bar is apparent; the normative conclusions there were ones as to which most similarly skilled

persons would agree. The Third Circuit, in *Melville v. American Home Assurance Co.*, 584 F.2d 1306 (3d Cir. 1978), permitted the admission of reports which contained some conclusory material, but which did not contain an opinion as to the cause of the airplane crash involved in the litigation. *Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984), decided by the Fourth Circuit, permitted admission of a summary of correlative data reports prepared by the Center for Disease Control, but did not involve the admission into evidence of any written opinion as to the probable cause of injuries. The Sixth Circuit, in *Wilson v. Beebe*, 743 F.2d 342 (6th Cir. 1984), admitted a report which contained simple evaluative conclusions as to which most similarly skilled or trained persons would agree, and which were based on apparently clear and undisputed facts. Also, in *In the matter of the Complaint of Paducah Towing Company, Inc. v. United States*, 692 F.2d 412 (6th Cir. 1982), the Sixth Circuit admitted the findings of an administrative law judge made after a quasi-judicial hearing. It is unclear whether the "findings" were opinions as to ultimate cause. And in *Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), the officer whose report had been entered into evidence was available at the trial for cross-examination. In *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986), and *Plummer v. Western International Hotels Co., Inc.*, 656 F.2d 502 (9th Cir. 1981), there are no indications as to the specific wording of the conclusions that were contained in the disputed Equal Employment Opportunity Commission reports, but it is unlikely that one person's "expert opinions" as to the ultimate issues were rendered in the reports. The Eighth Circuit in *Kehm v. Proctor and Gamble Mfg. Co.*, 724 F.2d 613 (8th Cir.

1983), like *Ellis*, admitted Center for Disease Control studies based upon normative data which contained no written opinion as to the probable cause of the plaintiff's injuries. The Tenth Circuit case of *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986) involved the admission of a report compiled by a public agency review board after a hearing into a police shooting. There were no review board type hearings held in the instant case.

While a difference in principle may exist within the circuits as to whether 803(8)(C) should be read literally or liberally, the variety of factual settings and diversity as to the nature of the opinions admitted in the various circuits indicate that the conflict in the instant case is not sufficiently direct to justify a grant of certiorari.

Petitioners have pointed to intra-circuit conflicts between decisions in the Second and Fifth Circuits. Intra-circuit conflict is not, under Supreme Court Rule 17, a basis for granting a writ of certiorari. Moreover, the most recent decisions of the Second and Fifth Circuits involving Rule 803(8)(C) have upheld the exclusion of certain opinions expressed in investigative reports. *See Stissi v. Interstate and Ocean Transport Co.*, 765 F.2d 370 (2d Cir. 1985) (upholding district court's editing out conclusory portions of a Coast Guard report); *McQuaig v. McCoy*, 806 F.2d 1298 (5th Cir. 1987) (upholding district court's exclusion of police department internal affairs report containing investigator's opinions that investigated officer's actions were "capricious and prejudicial").

Finally, Petitioners' argument that the Eleventh Circuit is in conflict with the Supreme Court's decision in

Chandler v. Roudebush, 425 U.S. 840 (1976) is weak at best. *Roudebush* involved several issues pertaining to the judicial reviewability of federal employee discrimination claims after administrative remedies have been exhausted. The court stated in footnoted dicta that prior administrative findings concerning the employment discrimination claim were admissible in a federal distrct court's *de novo* revew of the matter. 425 U.S. at 863, n.39. That dicta made only a general reference to Federal Rule 803(8)(C) "findings" with no discussion, explanation or description of the types of findings which would be admissible.[6] *Roudebush* can hardly be said to establish Supreme Court authority controlling the admission of probable cause opinions from a Naval Judge Advocate General officer's one man investigation of an accident.

C. The Eleventh Circuit's Narrow Construction of Rule 803(8)(C) is the Correct View. Accordingly, the Supreme Court Should Not Grant Certiorari if the End Result is to Affirm the Eleventh Circuit.

The Eleventh Circuit's rejection of the broad admissibility approach to the "factual finding" language of 803(8)(C) was and is correct. Accordingly, this Court should deny certiorari.

The Eleventh Circuit's "narrow" construction approach is correct for several reasons:

---

6. While a solitary District Judge has interpreted *Roudebush* as a "broad directive for liberal use of agency findings," *Cohen v. General Motors*, 534 F. Supp. 509 (W.D. Mo. 1982), such a directive would be inapposite for the instant case because *Roudebush* involved a governmental agency's administrative findings produced after a quasi-judicial hearing and other administrative proceedings.

(1) The plain wording of Federal Rule of Evidence 803(8)(C) expressly limits the admissibility of reports to their "factual findings", making no allowance for the admission of opinions and conclusions. Had the Supreme Court and Congress intended opinions and conclusions to be admissible under this rule, they could have written the rule to expressly so provide, as was done with Rule 803(6) which expressly provides for admission of the opinions and diagnoses contained in business records.[7] It was this plain, forthright approach to Rule 803(8)(C) which lead the Fifth Circuit in *Smith v. Ithaca Corp.*, 612 F.2d 215, 221-222 (5th Cir. 1980), to conclude that an opinion contained in a Coast Guard investigation report was not admissible as a "factual finding". *Smith* became binding precedent in the Eleventh Circuit upon that circuit's formation[8] and its ruling, as well as it reasoning, today remain part of the Eleventh Circuit's jurisprudence. It represents the correct construction of Rule 803(8)(C)'s

---

7. Federal Rule of Evidence 803(6) provides:

   Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

8. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

"factual finding" language, and its reasoning is commended to this Court for its logical, forthright and fair approach.

(2) Although advocating a liberal reading of Rule 803(8)(C), even the analysis of the rule contained in Weinstein's evidence treatise suggests that there should be some limitation on the extent to which opinions may be regared as findings of fact. The treatise advocates that "[i]f the report states a conclusion that would be helpful—and is reliable—it should be admitted." 4 Weinstein's *Evidence,* 803(8)[03] at 803-251. Weinstein quotes the opinion of a district judge who, after an extensive review of Rule 803(8)(C) cases, stated that it is now generally accepted that "evaluative reports of public agencies (i.e., those rendering *normative* judgments or opinions, not just reciting facts) are admissible". 4 Weinsiten, *supra* at 803-251, (*citing Zenith Radio Corporation v. Matsushita Electric Industries Co.,* 505 F. Supp. 1125 (E.D. Pa. 1980)).

The admission in this case of the official written opinion of the Naval JAG Officer as to the cause of the crash was not "helpful" to the jury in performing their difficult task of sorting the conflicting evidence and opinions and reaching their decision. More "helpful" to the jury might be the admission of "normative conclusions." That was the approach followed in *In Re Air Crash Disaster at Mannheim, Germany,* 586 F. Supp. 711 (E.D. Penn. 1984), *Rev'd on other grounds,* 769 F.2d 115 (3d Cir. 1985), *cert. den.,* 106 S. Ct. 851 (1986) where the court observed "[i]t is now settled that evaluative reports (i.e. *those containing normative conclusions* in addition to a recitation of facts) are admissible." 586 F. Supp. at 725 (emphasis

added). However, the JAG officer's opinion involved here goes beyond being a finding of fact or a normative conclusion. It goes far beyond that which is based upon directly observable facts or well known tests. It was not a conclusion that all persons skilled in the art would likely be able to reach. As such, the opinion was not one that was helpful to the jury but rather was one which became a substitute for the jury's decision and therefore helpful only to the party who offered the opinion.

(3) Moreover, the reading of Rule 803(8)(C) by the Eleventh Circuit is correct because it is fair. Federal Evidence Rule 102 provides that the Rules of Evidence "shall be construed to secure fairness in administration . . . and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined." Neither fairness nor the ascertainment of truth were promoted by allowing a jury evaluating complicated causation testimony, which included vigorous and wide disagreement among various experts, to be shown an official Naval Judge Advocate General's opinion as to the ultimate issue to be decided by them. None of the circuit court cases cited by petitioners as following the broader application of the rule expressly condone the admission, as in the trial below, of the written opinion of one man not available for cross-examination regarding the ultimate issue of causation to be decided by the jury. The conclusion of the JAG officer who authored the report in the case at bar contained far more than factual findings and normative conclusions and was correctly deemed inadmissible by the Eleventh Circuit's holding.

D. Whether the Eleventh Circuit Correctly Applied Rules 106 and 801 is Not An Issue This Court Should Address, As No Conflict is Involved And the Application of the Rules to the Facts Was Unanimously Supported By the Eleventh Circuit Judges.

While petitioners urge that the Eleventh Circiut erred in its application of Rules 106 and 801, none of the petitioner's have asserted that the Eleventh Circuit's decision applying Rules 106 and 801 presents independent grounds for granting certiorari. That ruling is not and cannot be a basis for granting certiorari, and should not be reconsidered by this Court. The Eleventh Circuit, as a panel, 784 F.2d at 1523 and in its *en banc* consideration of this case, 827 F.2d at 1498, was unanimous in ruling that Rainey's testimony regarding the remaining portions of his letter was improperly excluded by the trial judge and should have been admitted under both Rule 106 and Rule 801. The Eleventh Circuit judges were unanimous in their directive that a new trial was required on that ground alone.

———o———

CONCLUSION

The circuits have interpreted Rule 803(8)(C) in a variety of ways. Depending largely upon the nature of the opinion deemed to be "factual findings", the circuits differed in what should or should not be admissible. The Advisory Committee for this Court recognized that the federal courts differed as to whether "evaluative reports" would be admissible but did not attempt to make the express wording of the rule any more specific. Historically,

conflicts in the circuits as to the proper construction of Rules of Evidence have not been resolved by conflict certiorari. This has particularly been true in civil cases. The difference of opinion as to the construction of the "factual findings" language of 803(8)(C) is not a sufficiently "direct conflict" to justify the Court's granting certiorari. Moreover, the existing Eleventh Circuit precedent is correct. Accordingly, this court should deny the petitions for writ of certiorari.

Respectfully submitted,

DENNIS K. LARRY
DONALD H. PARTINGTON
CLARK, PARTINGTON, HART,
LARRY, BOND & STACKHOUSE
Counsel for Respondents
125 West Romana Street
P.O. Box 13010
Pensacola, FL 32591-3010
(904) 434-9200

and

EDWARD R. CURTIS
McCUNE, HIAASEN, CRUM,
FERRIS & GARDNER
P.O. Box 14636
Fort Lauderdale, FL 33302
(305) 462-2000